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Canada

RESTRICTIVE TRADE PRACTICES COMMISSION

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REPORT

Concerning the Distribution and Sale of Gasoline in
the Toronto Area (Alleged Price Discrimination -
The British American Oil Company Limited)

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DEPARTMENT OF JUSTICE
OTTAWA

∞

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1961

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RESTRICTIVE TRADE PRACTICES COMMISSION



R E P O R T

CONCERNING THE DISTRIBUTION AND SALE OF
GASOLINE IN THE TORONTO AREA (ALLEGED
PRICE DISCRIMINATION - THE BRITISH AMERI-
CAN OIL COMPANY LIMITED)

COMBINES INVESTIGATION ACT


O t t a w a
1961

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1961

RESTRICTIVE TRADE PRACTICES COMMISSION

C. Rhodes Smith, Q.C., M.A., LL.B., B.C.L.
Chairman

Pierre Carignan, Q.C., M.A., LL.L.	A.S. Whiteley, B.A., M.A.
Member	Member



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RESTRICTIVE TRADE PRACTICES COMMISSION

O T T A W A

April 12, 1961

Honourable E. Davie Fulton, P.C., Q.C., M.P.,
Minister of Justice,
Ottawa.

Sir:

I have the honour to submit to you herewith the report of the Restrictive Trade Practices Commission dealing with instances of alleged price discrimination in the sale of gasoline in the Toronto area by The British American Oil Company Limited.

The matter was brought before the Commission by the submission of a statement of the evidence obtained in the inquiry by the Director of Investigation and Research under the Combines Investigation Act and has been dealt with in accordance with the provisions of Sections 18 and 19 of the Act.

Argument on the Statement of Evidence was heard by the Commission in proceedings before the Chairman of the Commission and Mr. A. S. Whiteley, Member, at Toronto on March 6, 1961. At these proceedings Messrs. J. J. Quinlan and A. C. Whealy appeared on behalf of the Director of Investigation and Research and Messrs. J. J. Robinette, Q.C. and J. H. C. Clarry appeared on behalf of The British American Oil Company Limited.

Yours faithfully,

(Sgd.) C. Rhodes Smith

C. Rhodes Smith
Chairman

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CHAPTER I

INTRODUCTION

1. Reference to the Commission

This inquiry was brought before the Commission by the Director of Investigation and Research under the Combines Investigation Act submitting under date of November 21, 1960 a statement of the evidence which had been obtained in the inquiry. At the same time the Director submitted a copy of the Statement of Evidence to The British American Oil Company Limited, against whom allegations were made therein. In the Director's Statement and in this report The British American Oil Company Limited is sometimes referred to as "B.A. Oil" or the "Company".

2. Hearings and Witnesses

The origin of the inquiry and its conduct are described as follows in the Statement of Evidence:

"2. This inquiry was commenced by the former Director of Investigation and Research pursuant to section 8(b) of the Act as a result of a complaint received from Ontario Retail Gasoline and Automotive Service Association.

3. The evidence contained in this inquiry, which is incorporated by reference and summarized in the Statement, consists of:

- (a) Oral evidence heard before Mr. A. S. Whiteley, Member of the Restrictive Trade Practices Commission, on January 5, 1960, in Toronto, pursuant to section 17 of the Act. At this hearing Austin Cecil Chambers, lessee gasoline retail operator; Guy Worrall Mills, Secretary and Director of Mills & Hadwin, Limited and Hans Arnold Kolstad, lessee gasoline retail operator, were examined.

- (b) Exhibits 1 and 2 filed during the course of the evidence of the persons referred to in paragraph (a) . . .
- (c) Return of Information of Leonard Rutledge Woolsey, General Manager of The British American Oil Company Limited, dated September 30, 1959.
- (d) Letter dated January 18, 1959 [sic] from G. W. Mills to A. C. Whealy, Combines Officer making a correction in his evidence and adding information as to then current purchase and selling prices of Mills & Hadwin, Limited."

On receipt of the Statement of Evidence the Commission, in accordance with the provisions of Section 18 of the Combines Investigation Act, fixed Monday, the 6th day of March, 1961, at 10 a.m., in the Board Room, Department of Labour, MacKenzie Building, 36 Adelaide Street West, Toronto, Ontario, as the date, time and place at which argument in support of the Statement of Evidence might be submitted by or on behalf of the Director of Investigation and Research and at which The British American Oil Company Limited would be allowed full opportunity to be heard with respect to the allegations against the Company made in the Statement of Evidence.

At the hearing held on March 6, 1961 the following appearances were entered:

J. J. Quinlan	- For Director of Investigation
A. C. Whealy	and Research
J. J. Robinette, Q.C.	- For The British American
J. H. C. Clarry	Oil Company Limited

Before argument was heard by the Commission one witness, Mr. Albert G. Bennett, employee, The British American Oil Company Limited, gave evidence. Exhibits H-1 to H-9 were also filed. In this report reference to evidence given in the inquiry conducted by the Director will be made as (Evidence, p. . . .) and reference to proceedings before the Commission as (Hearing, p. . . .).

3. Allegations in the Statement of Evidence

The concluding section of the Statement of Evidence contains the following summary and allegations:

"40. The evidence obtained in this inquiry discloses that B.A. Oil has granted an allowance or discount of one cent per gallon by a month-end credit on both premium and regular grades of gasoline to Mills & Hadwin since September 1, 1955. Being an independently owned retail outlet, Mills & Hadwin was free to choose what brand of gasoline it would sell at the time the 1955 contract was negotiated and, in order to obtain this location as an outlet for its brands of gasoline and meet competitive offers of other suppliers, B.A. Oil undertook to grant this allowance or discount effective for a five-year period. A. C. Chambers and H. A. Kolstad, being lessee dealers, did not receive such a discount.

41. The evidence also discloses that from time to time during the existence of a retail gasoline 'price war' in the metropolitan Toronto area in 1959 it was a policy of B.A. Oil to 'assist those of its dealers who request assistance and who demonstrate their inability to compete with prices established in their area,' * by means of a temporary competitive allowance off the basic tank wagon price by which the dealer was ensured of a gross margin of five cents per gallon between his net purchase price and retail selling price. In granting such allowance, therefore, the Company ordinarily established a maximum selling price, either directly or indirectly, above which the dealer could not sell while in receipt of such allowance. In periods other than 'price war' periods, temporary local competitive allowances either are withdrawn or substantially reduced.

42. The evidence also discloses that during the period April 17 to July 25, 1959, TCA [**] on regular gasoline was first granted on April 21 and on premium gasoline it was first effective on June 19, the first delivery thereafter being on June 22 in the area covered in the return of information of the General Manager of B.A. Oil. TCA was not granted to all dealers in this area at the same time nor did all dealers receiving TCA receive the same amount.

43. In the case of Mills & Hadwin the TCA received was in addition to the discount or allowance of one cent per gallon referred to in paragraph 40. Therefore, it was able to purchase both premium and regular gasoline from the Company one cent per gallon cheaper than Mr. Chambers and Mr. Kolstad throughout the period April 17 to July 25, 1959, except for those occasions when either Mr. Chambers or Mr.

* Return of Information of the General Manager of B.A. Oil.

** Temporary Competitive Allowance;

Kolstad was receiving TCA of at least one cent per gallon when Mills & Hadwin were not, or receiving TCA at least one cent per gallon higher than Mills & Hadwin when they were in receipt of TCA. In the case of premium gasoline, therefore, as illustrated in paragraph 22, Mills & Hadwin received a better price than either Mr. Chambers or Mr. Kolstad throughout the period. In the case of regular gasoline, as illustrated in paragraph 19, Mills & Hadwin received a better price than Mr. Chambers from May 1 to the end of the period and, in the case of Mr. Kolstad, from May 20 to the end of the period.

4. The evidence of Mr. Chambers and Mr. Mills establishes that the outlets of Mr. Chambers and Mills & Hadwin are in relatively close proximity, and the area from which each draws its customers overlaps. Mr. Kolstad's outlet is located some distance from those of Mr. Chambers and Mills & Hadwin, and in a period of relatively stable prices he does not appear to draw his customers from the same areas as they do. The evidence establishes, however, that in May when Mr. Kolstad was receiving TCA of 7.4 cents per gallon on regular gasoline, his retail prices dropped substantially below those of Mr. Chambers and some of Mr. Chambers' customers not only complained but temporarily made their purchases from Mr. Kolstad so that, in such circumstances, they were in active competition. Since Mills & Hadwin is located between the outlets of Mr. Kolstad and Mr. Chambers, it is reasonable to assume that Mr. Kolstad likewise was a competitor at this time. Paragraph 19 illustrates that deliveries of regular gasoline to Mills & Hadwin and Mr. Chambers were much less frequent at this time than during the remainder of the period.

45. The evidence in paragraph 14 indicates that Mills & Hadwin were offered TCA by the Company at some time prior to June 22 but refused it since they felt that the Company had no right to specify a maximum retail selling price by Mills & Hadwin as a condition upon which TCA would be granted. Section 412(1)(a) of the Criminal Code (S.C. 1953-54, C. 51) makes no provision for the imposition by a seller of terms of purchase on a buyer beyond purchase of like quality and quantity for a purchaser to be entitled to the same net price as his competitors.

46. It is alleged that The British American Oil Company Limited between April 17 and July 25, 1959, both inclusive, was a party to the sale of premium gasoline that discriminated to its knowledge against competitors of the

purchaser, namely, Austin Cecil Chambers and Hans Arnold Kolstad in that a discount, rebate, allowance, price concession or other advantage was granted to Mills & Hadwin, Limited over and above any discount, rebate, allowance, price concession or other advantage available at the time of such sale to Austin Cecil Chambers and Hans Arnold Kolstad in respect of the sale of gasoline of like quality and quantity, within the meaning of section 412 of the Criminal Code. [*]

* Section 412 of the Criminal Code (which was incorporated in the Combines Investigation Act in 1960 as Section 33A) read as follows:

"412. (1) Every one engaged in trade, commerce or industry who

- (a) is a party to or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of the purchaser, in that any discount, rebate, allowance, price concession or other advantage, is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage, available at the time of such sale to such competitors in respect of a sale of goods of like quality and quantity;
- (b) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, having or designed to have the effect of substantially lessening competition or eliminating a competitor in such part of Canada; or
- (c) engages in a policy of selling goods at prices unreasonably low, having or designed to have the effect of substantially lessening competition or eliminating a competitor,

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) It is not an offence under paragraph (a) of subsection (1) to be a party or privy to, or assist in any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

(3) The provisions of paragraph (a) of subsection (1) shall not prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society."

47. It is further alleged that The British American Oil Company Limited between May 1 and July 25, 1959, both inclusive, was a party to the sale of regular gasoline that discriminated to its knowledge against a competitor of the purchaser, namely, Austin Cecil Chambers, in that a discount, rebate, allowance, price concession or other advantage was granted to Mills & Hadwin, Limited over and above any discount, rebate, allowance, price concession or other advantage available at the time of such sale to Austin Cecil Chambers in respect of the sale of gasoline of like quality and quantity, within the meaning of section 412 of the Criminal Code.

48. It is further alleged that The British American Oil Company Limited between May 20 and July 25, 1959, both inclusive, was a party to the sale of regular gasoline that discriminated to its knowledge against a competitor of the purchaser, namely, Hans Arnold Kolstad, in that a discount, rebate, allowance, price concession or other advantage was granted to Mills & Hadwin, Limited over and above any discount, rebate, allowance, price concession or other advantage available at the time of such sale to Hans Arnold Kolstad in respect of the sale of gasoline of like quality and quantity, within the meaning of section 412 of the Criminal Code.

49. It is further alleged that The British American Oil Company Limited between May 9 and 19, 1959, both inclusive, was a party to the sale of regular gasoline that discriminated to its knowledge against competitors of the purchaser, namely, Mills & Hadwin, Limited and Austin Cecil Chambers, in that a discount, rebate, allowance, price concession or other advantage was granted to Hans Arnold Kolstad over and above any discount, rebate, allowance, price concession or other advantage available at the time of such sale to Mills & Hadwin, Limited and Austin Cecil Chambers in respect of the sale of gasoline of like quality and quantity, within the meaning of section 412 of the Criminal Code.

50. It is further alleged that the discount, rebate, allowance, price concession or other advantage referred to in paragraphs 46, 47, 48 and 49 were granted as part of a practice of discriminating within the meaning of section 412(2) of the Criminal Code."

4. Position Taken with Respect to the Allegations on
Behalf of The British American Oil Company
Limited

The position taken with respect to the allegations in the Statement of Evidence as indicated in the submissions made by counsel for the Company at the hearing before the Commission may be summarized as follows:

1. Issue was taken with assertion that Mr. H. A. Kolstad was a competitor of Mr. A. C. Chambers and Mills & Hadwin, Limited. It was admitted that Mr. A. C. Chambers and Mills & Hadwin, Limited were competitors.
2. As stated in the Statement of Evidence, the 1955 contract which the Company made with Mills & Hadwin, Limited was negotiated and completed to meet competitive offers of other suppliers. It was submitted that as the one cent allowance was made by virtue of a contract which was necessary to meet competition it was not a violation of Section 412 as it then was of the Criminal Code.
3. In order to be an offence under Section 412 it has to be shown that the sale is part of a practice of discriminating. If it was proper for the Company to make the contract with Mills & Hadwin, Limited in 1955 it does not become a practice later on because of some other elements.
4. The property arrangements which the Company had with the three dealers differed and the cost to the Company in dealing with the three stations varied. It would be less costly for the Company to deal with an independent dealer who has his own service station than to enter into complicated leases, mortgages and lease-backs.
5. The granting of Temporary Competitive Allowance to Mr. H. A. Kolstad was not done for a predatory purpose or to eliminate a competitor but to enable a customer of the Company to stay in business because of an unusual and highly localized competitive situation. It is clear that it was a temporary allowance and not part of a practice. When the allowance of 7.4 cents per gallon was given to Mr. Kolstad and not to Mr. Chambers and Mills & Hadwin, Limited the period involved was only ten days. The action was taken to meet a special situation under special circumstances and could not be characterized as a part of a practice of discrimination.
6. It was submitted that to be a competitor the person must be a competitor at the moment or immediately before the time when the discount or price concession is given. In the retail gasoline trade it can not reasonably be said that under normal conditions in a

metropolitan area a service station is in competition with other stations handling the same brand of gasoline four miles away. It was further submitted that the evidence does not establish clearly that after the reduction in price by Mr. H. A. Kolstad he took business from the other two dealers four miles away, with a considerable number of stations situated in the intervening area.

7. With respect to the Temporary Competitive Allowance, it was submitted that a discount or allowance is available to competitors of a purchaser if they know that if they asked for it they could get it. There is no obligation for the supplier to go out and offer it. The Company makes the allowance available if competitors of the person receiving an allowance know of the existence of a Temporary Competitive Allowance and know that they can secure it if they ask for it and establish that the competition in their district requires them to have the benefit of it.

CHAPTER II

RELATIONSHIP BETWEEN THE BRITISH AMERICAN OIL COMPANY LIMITED, AUSTIN CECIL CHAMBERS, MILLS & HADWIN, LIMITED AND HANS ARNOLD KOLSTAD

The business relationship between The British American Oil Company Limited and the three retail dealers in its products is described in the following paragraphs in the Statement of Evidence and some additional particulars were given by counsel for the Company at the hearing before the Commission:

"4. The British American Oil Company Limited (hereinafter sometimes referred to as B.A. Oil or the Company) was incorporated under letters patent of the Dominion of Canada dated June 14, 1909, and the head office of the company is at 800 Bay Street in the City of Toronto, in the Province of Ontario.

5. Mills & Hadwin, Limited (hereinafter sometimes referred to as Mills & Hadwin) is a private company, incorporated under the laws of Ontario, and is located at 3147 Yonge Street in the City of Toronto, in the Province of Ontario, and owns the premises on which it carries on business. Mills & Hadwin operate an automobile dealership for the sale of Chrysler, Plymouth, Fargo and Roots [sic] products and, for the past twenty-five years, has been a retail dealer of gasoline supplied to it by B.A. Oil and of other petroleum products supplied both by B.A. Oil and other suppliers.

6. Austin Cecil Chambers is a lessee of B.A. Oil, operating a gasoline retail outlet located at 3383 Yonge Street in the City of Toronto, in the Province of Ontario. Mr. Chambers is the sole proprietor of this retail outlet. By an agreement entered into in or about the middle of 1958, B.A. Oil leased the land on which the service station is located to Mr. Chambers for fifteen years in consideration of the undertaking by him to erect service station buildings which will revert to the ownership of B.A. Oil at the end of the lease."

The following comment on the relationship of the Company with Austin Cecil Chambers was made by Mr. Robinette at the hearing:

"MR. ROBINETTE:

. . .

Now, on the other hand, the situation as to Chambers is quite different. There, British American owned the property. They have leased it for a period of 15 years to Chambers and they financed the construction of his service station building and loaned him the money and have taken back from him a mortgage of the leasehold to secure the advance to him. So as far as Chambers is concerned his situation, as I say, is that he has a lease for a fixed term of 15 years and I can put in that lease.

MR. QUINLAN:

That is not necessary as far as I am concerned. Chambers gave evidence as to that in his oral evidence. He said it was for a 15 year term as I recall it.

MR. ROBINETTE:

His position shortly is that he has the lease for 15 years plus the fact that British American Oil in 1958 financed for him the construction or reconversion of his building, loaned him the money and took back a mortgage on the leasehold as security for that advance.

MR. CHAIRMAN:

What becomes of the ownership of the building at the end of the 15 years?

MR. ROBINETTE:

It belongs to British American Oil. They own the property subject to a 15 year leasehold."

(Hearing, pp. 15 - 16)

The Statement of Evidence describes the position of Mr. Kolstad in the following way:

"7. Hans Arnold Kolstad is a lessee of B. A. Oil, operating a gasoline retail outlet located at the corner of Davenport

Road and Yonge Street, in the City of Toronto, in the Province of Ontario. Mr. Kolstad is the sole proprietor of this retail outlet and has been a lessee at this location since September, 1952."

It was stated by Mr. A. G. Bennett in evidence that Mr. Kolstad had ceased to operate the service station at the corner of Davenport Road and Yonge Street in 1960. Mr. Robinette gave the following information as to his position when he was a lessee of the Company:

"MR. ROBINETTE:

. . .

Now, as far as Kolstad is concerned he is still in a different position. The situation with reference to Kolstad is that British American do not own that land. They have leased it from the City of Toronto. The City of Toronto is the owner of the land and the city leases it for a term of 10 years to be computed from the first of January 1956. So British American Oil is a lessee of that property from the city for a definite term of ten years. Then, British American sublet it to Kolstad under a lease which was terminable on 30 days' notice."

(Hearing, p. 16)

The situation with respect to the allowance of one cent per gallon given to Mills & Hadwin, Limited is summarized in the Statement of Evidence as follows:

"8. Effective September 1, 1955, Mills & Hadwin and B. A. Oil entered into arrangements whereby Mills & Hadwin would restrict themselves to the sale of B. A. Oil brands of gasoline exclusively for a five-year period, and B. A. Oil, in return, would grant Mills & Hadwin an allowance or discount of one cent per gallon on both regular and premium grades of gasoline to be paid by a month-end credit. The Return of Information of the General Manager of B. A. Oil states this allowance was 'granted at that time to meet competitive offers of other suppliers'. In his evidence (pages 21-22) Mr. Mills stated the agreement for the five-year exclusive supply arrangement was contained in a written document and the agreement for the one cent per gallon allowance or discount was a verbal agreement which he believed had only been effective for the last two

or three years.* He also said that this discount is not reflected on the face of the invoices made at the time of delivery, and the monthly credit note is applicable as a set-off against Mills & Hadwin's current indebtedness to B. A. Oil."

* Exhibit D to the Return of Information, however, shows that this arrangement was effective September 1, 1955.

CHAPTER III

PRICING POLICIES OF THE BRITISH AMERICAN OIL COMPANY LIMITED DURING RETAIL PRICE WARS

1. Granting of Temporary Competitive Allowances during 'Price Wars'

The conditions existing in the retail gasoline trade in the Toronto area in 1959 are described in the Statement of Evidence as follows:

"10. It is a matter of common knowledge that during the year 1959 there were what are generally called 'price wars' in the retail sale of gasoline in the metropolitan Toronto area. In his evidence (page 5) Mr. Chambers stated that the duration of the 'price war' was from the latter part of April to about the end of July 1959. Mr. Mills (evidence, pages 22-23) was not sure of the date when the 'price war' commenced but thought it ended some time in August 1959. Mr. Kolstad (evidence, page 34) was not sure but thought it was in early May 1959. The Return of Information of the General Manager of B.A. Oil indicates that, generally speaking, the 'price war' commenced in the latter part of April and continued until near the end of July 1959, there being a period during May and early June when it appears to have modified or ceased entirely since, except for these periods, allowances off the tank wagon price of regular gasoline (B. A. 88) were given to many of the B. A. Oil dealers. On premium gasoline (B. A. Velvet 98) they were given generally during the latter part of June and in July 1959. These allowances are described by the Company as temporary competitive allowances (hereinafter sometimes referred to as TCA). The Return of Information of the General Manager of B. A. Oil contains the following in this regard:

' . . .

4. As indicated in Exhibit "D" the Company's marketing policy during a so-called "price war" is to assist those of its dealers who request assistance and who demonstrate their inability to compete with the prices established by competitors in their area;

the Company's temporary competitive assistance during the recent Toronto "price war" ensured a 5¢ spread to its dealer between his purchase price and the prevailing pump prices in his area.

5. It will be noted from Exhibit "C" that prices charged for product at the various outlets during the period specified vary; these variations reflect one or more of the following factors:

- (a) During the period in question prevailing pump prices fluctuated among the various service station localities in the specified area being surveyed and were not uniform on a day to day basis or even during any business day.
- (b) During the specified period dealers on occasion changed their pump prices during a business day; such changes might result in an outlet paying a different price between morning and afternoon deliveries or an outlet receiving a delivery in the morning being charged a different price than that paid by a dealer in the same area receiving a delivery in the afternoon on the same day.

. . .'

The Return of Information also states that the manner of payment of TCA was as follows:

'For deliveries - Off face of invoice and for inventories on hand by measurement - by cheque.'["]

Mr. A. G. Bennett gave the following evidence as to the granting of Temporary Competitive Allowances:

"MR. QUINLAN:

. . .

Q. Now, when you granted this temporary competitive allowance to Mr. Kolstad was he the only one you granted it to at that time in that area?

A. Yes, sir.

Q. To nobody else?

A. Nobody else.

- Q. On other occasions you did grant it to other people, didn't you?
- A. The only way we would grant a temporary competitive allowance is if our closest competitor had lowered his price and then we as salesmen would find out whether they were being allowed a temporary competitive allowance from their company and if we were able to find that out we would consequently allow our station to be competitive. If our station was here (indicating) and Imperial had one here (indicating) and, say, there are six down here (indicating) that are down in price then we went into a competitor here, we would not allow our station next door a temporary competitive allowance unless the closest competitor went down in price and we were able to fairly well substantiate that they were being allowed a TCA from their company.
- Q. So you base it purely on the proximity of the dealer?
- A. That is correct, sir.
- Q. In other words, if Stations A, B and C were in line on the same street and A is your station, B is a competitor and C is another competitor, if C got it you would not give it to your station?
- A. Not unless B got it."

(Hearing, pp. 11 - 12)

Mr. Chambers said in evidence that he first approached the Company to secure the Temporary Competitive Allowance but that subsequently he was informed by the Company when the allowance was withdrawn and when it would be granted to him (Evidence, pp. 6-11). He produced a letter from the Company which was filed as Exhibit 1. This letter, dated May 4, 1959, from J. Hoyle, Manager, Retail Sales in Metropolitan Toronto, to Mr. Chambers reads as follows:

"In view of the competitive price situation in your marketing area, this Company has decided to grant a Temporary Competitive Allowance off the tank wagon price of 88 Gasoline to enable you to remain competitive and to retain your present volume of business.

The Temporary Competitive Allowance consists of an allowance of 3.40¢ per gallon on our 88 Gasoline off the price for delivery by tank wagon (our current tank wagon price being 22.30¢ per gallon for 88, plus tax of 13.00¢, making a total of 35.30¢ per gallon).

This allowance will be deducted from the face of the invoice at each delivery during the currency of this arrangement. However, the allowance will only be granted provided you do not sell above a maximum price set by the Company from time to time and which will be furnished to you in writing, and remain in effect until replaced by a later notice. This in no way specifies the price at which you are to sell our gasolines and you are at complete liberty to sell at a higher price or lower price. If you sell at a higher price you will not, however, qualify for the allowance, but if you sell at the same or a lower price you will qualify for such allowance.

The Company reserves the right to amend or to withdraw the Temporary Competitive Allowance at any time and you, of course, are free to adopt or reject the plan and to withdraw from it at any time."

The letter had the following postscript:

"P.S. At the present time, and until further notice, the maximum price referred to above is 36.90¢ per gallon, tax included."

Mr. Chambers said when the Temporary Competitive Allowance was given by the Company on premium gasoline it was dealt with in the same way and the margin obtainable by him was also 5 cents per gallon (Evidence, pp. 12-13).

Mr. Mills of Mills & Hadwin, Limited said in evidence that when the Temporary Competitive Allowance was granted to dealers in the neighborhood he approached the Company but he was unwilling to accept the maximum selling price as a condition of receiving the allowance. Mr. Mills said that he had dealt with Mr. Dave Howard of The British American Oil Company Limited. His evidence, in part, is as follows:

"Q. And what was this conversation that you had with him?

A. Well, we were given to understand, and had seen invoices of people who were buying gasoline cheaper than we were.

Q. That is, British American people?

A. Yes, and others as well. We felt that we should be treated the same way as they were. Their volume was approximately equal to ours. I put it to him that if they were getting it at 'X' cents a gallon, then we should be getting it at 'X' cents a gallon. The tenor of their reply was that if we agreed to sell at a price that would give us not more than 5 cents profit per gallon --

Q. And when you are talking about 'profit' you mean gross margin, do you?

A. Yes, gross margin -- then we would receive gasoline at the same price as the people around us. I countered and said that they had no right, in law or otherwise, to tell us at what price we would sell our gasoline, and that we would sell at our own price, and as we saw fit; but that we wanted to buy it at the same price as anybody else did. The conversation closed on that note.

At this time we were not doing any business, as we were selling -- we were taking the 8-cent profit, and of course getting it at the old price.

. . .

A. . . . After this conversation we were not doing much business and, seeing that the TCA was predicated upon the lowest prevailing price in the area, we decided to cause a little disturbance. So we dropped our price so that we were making 2 cents a gallon.

My word! We did business. We had people lining up to get in. We took advantage of that to go like mad in the back, selling tires and accessories and lubricants, and so on. We even sold, as a result of that, two automobiles. So I do not think it was entirely unprofitable for us. But we certainly did move a lot of gasoline.

Q. This was just before you got the TCA, was it?

A. Yes. We sold our tanks dry. Then we started to scream to them, that we needed assistance. I think we screamed that way, anyway. We said that we wanted a price. That had the effect of forcing the price down in the neighborhood, too, I believe.

. . .

- Q. When you started to get this TCA was there a condition to it, that your gross margin would be 5 cents?
- A. Yes, or less.
- Q. And you complied with that?
- A. As a matter of fact we still held it to 3 cents, just to drive the price down farther, and particularly to embarrass British American Oil Company further, because we knew they would have to come down, too. They were losing money on the deal, or not making so much profit.
- Q. And was this temporary competitive allowance in addition to the one cent we were talking about previously that you get on the monthly basis?
- A. Yes, that is entirely separate."

(Evidence, pp. 23 - 27)

Mr. Mills's evidence was the Temporary Competitive Allowance on premium gasoline was dealt with in the same way as the allowance on regular gasoline (Evidence, pp. 29-30).

Mr. Kolstad said in evidence that he first approached The British American Oil Company Limited for the Temporary Competitive Allowance when dealers in the neighborhood handling other brands of gasoline reduced their prices (Evidence, pp. 34-37).

Mr. A. G. Bennett said in evidence that the nearest competitor of Mr. Kolstad is a gasoline outlet on the opposite side of Yonge St. operated by Canadian Tire Corporation Limited. He also said that there is an Imperial Oil station a short distance to the southwest on Davenport Road. Both these stations had reduced the price of regular gasoline to 32.9 cents per gallon in May, 1959 before a Temporary Competitive Allowance of 7.4 cents per gallon was given by the Company to Mr. Kolstad to enable him to meet this competition (Hearing, pp. 8-9). When Mr. Kolstad gave evidence in the inquiry in January, 1960 he said that he was still receiving Temporary Competitive Allowances on both premium and regular gasoline (Evidence, p. 36).

2. Temporary Competitive Allowances Granted to
Mills & Hadwin, Chambers and Kolstad

Information as to Temporary Competitive Allowances made by the Company to Mills & Hadwin, Limited, Mr. A. C. Chambers and Mr. H. A. Kolstad is summarized in the Statement of Evidence as follows:

"16. The following Table based on the Return of Information of the General Manager of B. A. Oil sets out the various Temporary Competitive Allowances granted on regular gasoline to Mills & Hadwin and Mr. Chamber and Mr. Kolstad during the period April 17 to July 25, 1959, both inclusive, together with the respective volume of purchases of such gasoline by each of them:

<u>Dates *</u>	<u>No. Days</u>	<u>M. & H.</u>		<u>Chambers</u>		<u>Kolstad</u>	
		<u>T.C.A.*Gals.</u>		<u>T.C.A. Gals.</u>		<u>T.C.A. Gals.</u>	
April 17-21	5	0	0	0	2,500		0
April 21-May 4	14	0	1,900	3.4	3,650	3.4	4,600
May 5-May 8	4	0	2,200	0	3,300	0	2,500
May 9-May 20	12	0	3,100	0	4,550	7.4	41,200
May 21-June 8	19	0	3,850	0	5,000	0	8,800
June 9-21	13	0	0	0	5,200	0.4	6,400
June 22-29	8	4.4†	6,100	4.4	2,500	4.4	3,500
June 30-July 20	21	7.4†	13,345	7.4	9,300	7.4	9,200
July 21-25	5	1.9	0	1.9	2,650	1.9	3,100
Total			30,495		38,650		79,300 "

* Dates are calculated with reference to Return of Information, Exhibit C, and do not necessarily agree with the dates set out in Exhibit D.

** Exclusive of 1 cent discount.

† Return of Information, Exhibit C, disagrees with Exhibit D. Exhibit C shows net price of 26.9 cents per gallon on July 1; if the 1 cent discount referred to is excluded, the net price would be 27.9 cents per gallon, i.e., TCA of 7.4 cents per gallon. Exhibit D, however, shows that from June 19 to July 2 the TCA was 4.4 cents, which should result in a net price on July 1 of 30.9 cents.

The Statement of Evidence points out that while the data in the foregoing table indicate that the maximum allowance to Mills & Hadwin, Limited was 7.4 cents per gallon, invoices of July 14 and 20, 1959 show an allowance of 8.4 cents per gallon on regular gasoline (Exhibit 2).

It will be seen from the table set out above that very substantial quantities of regular gasoline were delivered to Mr. Kolstad during the period May 9 to 20, 1959 when the Temporary Competitive Allowance to him was 7.4 cents per gallon, and no such allowance was being given to Mills & Hadwin, Limited and Mr. Chambers. In the period June 30 to July 20 when all three dealers received a Temporary Competitive Allowance of 7.4 cents, deliveries of gasoline increased but those to Mr. Kolstad were much less than in the previous period when he alone received an allowance of 7.4 cents per gallon.

Individual deliveries of regular gasoline to the three dealers and the net price applicable to each delivery are set out in the Statement of Evidence as follows:

		<u>" Mills & Hadwin</u>		<u>Chambers</u>		<u>Kolstad</u>	
<u>Date</u>		<u>Gals.</u>	<u>Net Price*</u>	<u>Gals.</u>	<u>Net Price</u>	<u>Gals.</u>	<u>Net Price</u>
April 21				2,500	35.3	1,700	31.9
22		1,900	34.3				
28				3,650	31.9	2,900	31.9
May 5				3,300	35.3	2,500	35.3
6		2,200	34.3				
9						2,200	27.9
11						3,800	27.9
12				2,600	35.3	3,600	27.9
13						3,000	27.9
14						1,400	27.9
14						4,300	27.9
15						3,700	27.9
15						2,800	27.9
16						3,600	27.9
16						3,000	27.9
18						4,100	27.9
19				1,950	35.3	2,600	27.9
19						3,100	27.9
20		3,100	34.3				
21						2,800	35.3
26				2,200	35.3	3,100	35.3
27		1,650	34.3				
June 2				2,800	35.3	2,900	35.3
3		2,200	34.3				
9						3,400	34.9

* Including the discount of one cent per gallon.

		<u>Mills & Hadwin</u>		<u>Chambers</u>		<u>Kolstad</u>	
<u>Date</u>		<u>Gals.</u>	<u>Price*</u>	<u>Gals.</u>	<u>Price</u>	<u>Gals.</u>	<u>Price</u>
June	12			4,100	35.3		
	16			1,100	35.3	3,000	34.9
	22	3,200	29.9				
	23			2,500	30.9	3,500	30.9
	26	2,900	29.9				
	30			4,100	27.9	3,100	27.9
July	1	2,600	26.9				
	3	995	26.9				
	6	1,100	26.9			3,200	27.9
	7					1,300	27.9
	8	2,000	26.9				
	13			1,100	27.9		
	14	3,000	26.9**	4,100	27.9		
	15					1,600	27.9
	20	3,650	26.9**				
	21			2,650	33.4		
	22					3,100	33.4
Total		30,495		38,650		79,300	

(Return of Information
Exhibit C) "

* Including the discount of one cent per gallon.

** These prices appear to be in error and the correct prices apparently should be 25.9 cents.

The Company's Return of Information indicates that the tank wagon prices of premium and regular gasoline remained unchanged at 40.3 cents and 35.3 cents per gallon respectively throughout the period April 21 to July 25, 1959.

Individual deliveries of premium gasoline to the three dealers and the net price applicable to each delivery are set out in the Statement of Evidence as follows:

		<u>" Mills & Hadwin</u>		<u>Chambers</u>		<u>Kolstad</u>	
<u>Date</u>		<u>Gals.</u>	<u>Net Price*</u>	<u>Gals.</u>	<u>Net Price</u>	<u>Gals.</u>	<u>Net Price</u>
April 21				1,100	40.3	1,100	40.3
22		1,000	39.3				
28				550	40.3	600	40.3
May 5				1,000	40.3	1,000	40.3
6		1,500	39.3				
12				1,500	40.3	500	40.3
19				1,100	40.3		
20		1,100	39.3				
26				1,000	40.3	1,000	40.3
27		1,800	39.3				
June 2				1,500	40.3	1,200	40.3
3		900	39.3				
9						900	40.3
16				1,950	40.3	800	40.3

* Including the discount of one cent per gallon

		<u>Mills & Hadwin</u>		<u>Chambers</u>		<u>Kolstad</u>	
<u>Date</u>		<u>Gals.</u>	<u>Net Price*</u>	<u>Gals.</u>	<u>Net Price</u>	<u>Gals.</u>	<u>Net Price</u>
June	22	600	34.9				
	23			1,600	35.9	600	40.3
	26	1,800	34.9				
	30			900	35.9	800	40.3
July	3	1,300	31.9				
	7					1,050	32.9
	8	1,750	31.9				
	14			2,600	32.9		
	15					600	32.9
	20	550	31.9**				
	21			950	37.9		
	22					1,000	37.9
		<hr/>		<hr/>		<hr/>	
Total		12,300		15,750		11,150	
		<hr/>		<hr/>		<hr/>	

(Return of Information
Exhibit C) "

* Including the discount of one cent per gallon.

** This price appears to be in error and the correct price apparently should be 30.9 cents. See invoice 47765 in Exhibit 2.

CHAPTER IV

COMPETITIVE RELATIONSHIP BETWEEN MILLS & HADWIN, LIMITED, AUSTIN CECIL CHAMBERS AND HANS ARNOLD KOLSTAD

The locations of the three retail outlets in relation to each other are set out in the Statement of Evidence as follows:

"26. Mr. Chambers' station is located at 3383 Yonge Street, Toronto, which is on the northeast corner of Yonge Street and Golfdale Road. Mills & Hadwin are located at 3147 Yonge Street which is on the northeast corner of Yonge and Wanless Avenue, one block north of Lawrence Avenue. The distance between these two outlets is approximately six blocks.

27. Mr. Kolstad operates a station located on the southwest corner of Davenport Road and Yonge Street, Toronto. Davenport Road is over three and one-half miles south of Lawrence Avenue on Yonge Street, so that Mr. Kolstad's outlet, therefore, is approximately four miles south of Mr. Chambers' station, the Mills & Hadwin outlet being approximately six blocks less than this distance, both these outlets being on the opposite side of Yonge Street to the Kolstad outlet."

As previously mentioned, it was admitted by the Company that Mills & Hadwin, Limited and Mr. Chambers are in competition with each other. Mr. Mills said in evidence that normally the selling prices of both regular and premium grades of gasoline at Mills & Hadwin, Limited were one cent per gallon higher than those at Mr. Chambers's station and other competitors in the locality (Evidence, p. 31).

The evidence indicates that under normal conditions a service station operator tends to regard his market as the area surrounding his place of business, principally within a half-mile radius. The area is not specifically defined because although an operator may know where many of his regular customers reside he will also have a certain amount of casual business.

When asked from what area he drew his gasoline trade Mr. Mills said it is a rather confused picture, but he added:

"A. . . .

I would say the immediate residential neighbourhood, though, is a good hard core of the customers for us. And then there are some around Austin Chambers, too. We have also cars on Golfdale around us as well, and they come to us for gasoline, as well as service."

(Evidence, p. 28)

Mr. Kolstad's evidence was as follows:

"Q. And approximately from what areas do you draw your trade?

A. It varies. I draw some from Rosedale, and the business section around my gasoline station, the surrounding area. But that is about it. Of course there is always a certain amount of transit trade.

Q. How far west would you go in the trade that you draw?

A. Well, it is hard to answer, as to how many people come from that far west. But I know I have some accounts that come from Avenue Road. But, as to any farther than that, as to steady ones -- I cannot say for sure, whether they are transient or steady customers.

Q. How about north on Yonge Street?

A. North on Yonge Street -- probably up as far as -- and this is just a guess -- as far as the subway station at Summerhill, I believe it is, at Ramsden Park, there.

Q. Did you find when you had the allowances that you were drawing customers from any farther away than you had been previously, or not?

A. Well, I was getting more of them. But where they come from is pretty hard to determine. That is hard to answer. But I did get more business when the price went down.

Q. Are there any B.A. stations in your immediate locality?

A. No, not too close; Yonge and Walker, which is up quite a piece. And there is this one down at Yonge and Gloucester. I think they are the two closest ones. And they are not too close to me.

Q. Are there any to the west of you, reasonably close, or not?

A. Well, Avenue Road, I believe, is the closest one -- Avenue Road and Lowther.

Q. Approximately how far would that be -- Avenue Road and Lowther?

A. Well, from Yonge to Avenue Road is about half a mile, approximately that, I guess.

1 Q. Have you any experience of gaining customers from Avenue Road and Lowther station, or losing, to them?

A. No, I do not believe so, no."

(Evidence, pp. 37-38)

Mr. A. C. Chambers gave the following evidence:

"Q. What area do you, generally speaking, draw your trade from?

A. Well, generally speaking, I would say anywhere from Lawrence Avenue up to 401. There are a few on either side, but not a great many."

(Evidence, pp. 13-14)

The distance to the north which Mr. Chambers mentioned would exceed a mile but from a map showing the location of gasoline outlets, filed as Exhibit H-1, it appears that there is only one outlet north on Yonge Street beyond a distance of one-half mile from Mr. Chambers's station. In regard to the period when some service stations were receiving a competitive allowance when Mr. Chambers was not, he gave the following evidence:

"Q. When you were not getting it, were your competitors selling at a lower price?

A. Not in the immediate vicinity, no; but they would be within a mile.

Q. Did that affect your business?

A. Oh, yes.

Q. You also mentioned that you are still getting TCA?

A. Yes."

(Evidence, p. 11)

Mr. Chambers considered that if a considerable drop in retail prices occurred in one area, such as a difference of more than 7 cents, this might have the effect of attracting customers from other areas (Evidence, pp. 16-18). Mr. Mills considered that a substantial difference in prices between two gasoline outlets four or five blocks apart would drastically affect the amount of business done by the station with the higher price but beyond that distance he could not say what the effect might be (Evidence, p. 29).

CHAPTER V

CONCLUSIONS AND RECOMMENDATION

1. Temporary Competitive Allowance

It is clear from the evidence that the Temporary Competitive Allowance given by The British American Oil Company Limited was used by the Company under severe competitive conditions in the retail gasoline trade which were characterized as "price wars". The granting of such an allowance was not part of the normal pricing system of the Company and was clearly designed as a temporary expedient to enable a customer of the Company to meet an immediate and local competitive situation. The Statement of Evidence alleged that in some circumstances the granting of a Temporary Competitive Allowance to a dealer in one part of the metropolitan market to meet a local competitive situation resulted in a discrimination in price to other customers of the Company in an area over four miles away, not granted a Temporary Competitive Allowance of like amount at the time. While it is likely that a substantial reduction in the retail price of gasoline in a particular area of a metropolitan market will affect the gasoline trade in adjoining areas and even in areas farther away, a persistence of the lower price is also likely to lead to a change in prices over a widening area. It is reasonable to conclude that when The British American Oil Company Limited found that its dealer, Mr. Kolstad, was faced with a sharp reduction in prices by his competitors about May 9, 1959 the Company expected that the extreme competitive situation would be shortlived and of a local nature. On the next occasion when the Company granted a Temporary Competitive Allowance of 7.4 cents per gallon it was given to Mr. Kolstad and also to Mr. Chambers and Mills & Hadwin, Limited, which indicates that the competitive situation was much more widespread than on the earlier occasion.

It is the opinion of the Commission that the differences in prices to Mr. Kolstad, Mr. Chambers and Mills & Hadwin, Limited which arose from the granting of a Temporary Competitive Allowance in the period covered by the inquiry do not form part of a practice of discriminating as described in former Section 412(1)(a) of the Criminal Code.

2. Special Allowance to Mills & Hadwin, Limited

The discount or allowance of one cent per gallon given by The British American Oil Company Limited to Mills & Hadwin, Limited under the arrangements effective September 1, 1955 whereby Mills & Hadwin, Limited entered into a contract to handle B.A. brands of gasoline exclusively for a five-year period is of a different nature than a Temporary Competitive Allowance.

As has already been mentioned, it was admitted that Mr. A. C. Chambers was a competitor of Mills & Hadwin, Limited at a time when the latter was being given an allowance of one cent per gallon which was not being given to Mr. Chambers. It is obvious that a difference in price of this character which is being secured by one competitor constitutes price discrimination with respect to the other competitor not receiving an equivalent reduction in price.

A number of grounds were advanced on behalf of The British American Oil Company Limited in justification of the allowance given to Mills & Hadwin, Limited. It was contended that price discrimination should be considered objectionable only when it is given for a predatory purpose involving an intention to remove or injure a competitor of the purchaser. While sub-clauses (b) and (c) of the former Section 412 refer to the elimination of a competitor there are no such provisions in sub-clause (a) which deals with price discrimination, and there seems no reason to consider that such provisions should be read into sub-clause (a).

A second ground advanced was that The British American Oil Company Limited had less cost in dealing with Mills & Hadwin, Limited than with Mr. Chambers, a lessee, with whom various property arrangements were made. It would appear, however, that any differences in cost would not be related to the relative costs of delivering gasoline to the two dealers but to real estate transactions between the Company and Mr. Chambers. It appears to the Commission that if a difference of price in the sale of a commodity is justified on the basis of a difference in cost, such cost should be related to the sale of the commodity.

It has generally been regarded that the provision in the law against discriminatory pricing is not intended to prevent a supplier from meeting what has been termed "spot competition" which would result in the loss of a customer if there was a failure to meet a more favourable price offered by a rival. It was submitted that The British American Oil Company Limited had to make the arrangement with Mills & Hadwin, Limited in 1955 for the special allowance of one cent per gallon as otherwise the Company would have lost the business of Mills & Hadwin, Limited to another oil company. There is no

evidence in the inquiry as to competitive offers of other oil companies to Mills & Hadwin, Limited in 1955. Mr. Mills's evidence in regard to the special allowance included the following:

"A. It is a verbal arrangement. As a matter of fact it has only been effective for the last two or three years,* I believe, because we found out that we could get it from some other oil company or -- well, I think any other oil company would be prepared to give it to us."

(Evidence, p. 22)

It was argued on behalf of The British American Oil Company Limited that the arrangement made by the Company with Mills & Hadwin, Limited in 1955 was a single transaction made to meet the immediate competitive situation and that the subsequent sales of gasoline to Mills & Hadwin, Limited at a discount of one cent per gallon do not constitute a practice. The Commission appreciates the force of the argument that in a single sale a supplier may have to make a difference in his prevailing price in order to avoid the loss of a customer. We do not think, however, that where a contract relates not to a single sale of goods but to conditions applying to a series of sales extending over a lengthy period of time the difference in price which results from the arrangement when sales are made to a competitor can be regarded as though it related only to a single sale. When Mr. Chambers became a competitor of Mills & Hadwin, Limited and the latter received an allowance on each sale of gasoline which was not available to Mr. Chambers, it is the opinion of the Commission that there was price discrimination in the sales to the two competitors. The difference in price on sales to Mills & Hadwin, Limited and sales to Mr. Chambers because of the special allowance granted to the former was not of an isolated or temporary nature but a persisting one and consequently resulted in a continuous discrimination in price on the part of The British American Oil Company Limited against Mr. Chambers. Put in another way, the agreement effective September 1, 1955 established a practice, for the next five years, of discriminating to the extent of one cent per gallon, in favour of Mills & Hadwin, Limited, as against any other B.A. dealer competing with that firm which did not receive the same discount.

* As previously indicated, the arrangement was effective September 1, 1955.

Mr. Chambers became such a competitor of Mills & Hadwin, Limited about the middle of 1958, and at least during the period covered by the inquiry did not receive this one cent discount.

3. Recommendation

The construction which the Commission has given to the section dealing with price discrimination is considered to construe properly the language of the section and the economic relationship between Mills & Hadwin, Limited and Mr. Chambers. There have, however, been no judicial interpretations of former Section 412 which would assist in its construction as applied to particular situations.

It will be recalled that the arrangement between The British American Oil Company Limited and Mills & Hadwin, Limited for the special allowance was related to an exclusive dealing arrangement effective September 1, 1955 for a five-year period. The term of this arrangement has now expired and the evidence in the inquiry does not indicate whether the special allowance has been continued, and if so, under what conditions. If the situation with respect to the special allowance is the same now as at the time of the inquiry the Commission would recommend that a judicial order be sought under the provisions of Section 31(2) of the Combines Investigation Act to restrain The British American Oil Company Limited from discriminating in price between Mills & Hadwin, Limited and Mr. A. C. Chambers, subject to such conditions as the Court may see fit to impose.

(Sgd.) C. R. Smith

Chairman

(Sgd.) A. S. Whiteley

Member

Ottawa,
April 12, 1961.

